

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Region 20, Subregion 37

OCEANIC TIME WARNER CABLE	)	
	)	
Employer,	)	
	)	
and	)	
	)	
LOCAL 1186, INTERNATIONAL	)	No. 20-RC-145340
BROTHERHOOD OF ELECTRICAL	)	
WORKERS, AFL-CIO	)	
	)	
Union.	)	
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**POST-HEARING BRIEF OF EMPLOYER OCEANIC TIME WARNER CABLE**

LAW OFFICE OF DANIEL SILVERMAN LLP

DANIEL SILVERMAN  
53 3<sup>rd</sup> Street  
Brooklyn, NY 11231  
Telephone: (718) 237-8693  
Facsimile: (718) 855-2933

*Attorneys for Employer*  
*OCEANIC TIME WARNER CABLE*

WATANABE ING LLP

A Limited Liability Law Partnership

RONALD Y.K. LEONG      #1194-0  
STACI M. FUJIKAWA      #8430-0  
First Hawaiian Center  
999 Bishop Street, 23rd Floor  
Honolulu, Hawaii 96813  
Telephone: (808) 544-8300  
Facsimile: (808) 544-8399

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## **POST-HEARING BRIEF OF EMPLOYER OCEANIC TIME WARNER CABLE**

### **I. Statement of the Issues**

- A. Whether a Dispatcher whose work is intimately related to construction, installation, maintenance and service in the Employer's cable operations in Kona should be included in a bargaining unit containing employees performing such work.
- B. Whether an OSP Engineer who performs no work related to construction, installation, maintenance and service in the Employer's cable operations in Kona should be included in a bargaining unit containing employees performing such work.

### **II. Introduction**

The resolution of the challenged ballots of the Dispatcher and the OSP Engineer in this case requires the Hearing Officer to decide between two entirely contradictory positions on the eligibility of the two employees at issue. While Oceanic Time Warner Cable ("Employer" or "Oceanic") contends that the Dispatcher is eligible and the OSP Engineer ineligible to vote, the International Brotherhood of Electrical Workers, AFL-CIO ("Union" or "IBEW") contends that the Dispatcher should be ineligible and the OSP Engineer eligible. However, only the Employer's position is justified by established Board law based on the intent of the stipulated unit, the Employer's organizational structure and the actual day to day responsibilities of the employees at issue. The Employer's position reflects the realities of its operations, while the Union's position reflects only the extent of its support, and an attempt to exclude one employee who is an integral part of the stipulated unit and replace her with an employee plucked from another department with different responsibilities and skills and little contact with unit employees. Not only does the Union's position contradict the intent of the parties, the realities of the Employer's business and established Board law and policy, it excludes the Dispatcher from



the only bargaining unit she could reasonably belong to and removes the OSP Engineer from his appropriate unit.

It is the position of the Employer that the Dispatcher, Ms. Cora Bush, is eligible to vote in the election and that the OSP Engineer, Mr. Charles Peterson, is not eligible to vote in the election.

### **III. Procedural Background**

On January 29, 2015, the Union filed a petition seeking to represent a unit of employees located at Oceanic's facility at 73-4873 Kanalani Street, Kailua-Kona, Hawaii 96740 ("Kona facility"). The petition sought the following unit:

**Included**

Production and Maintenance employees performing work related to construction, installation, maintenance and service in the Cable Communication Industry

**Excluded**

Office clerical, professional, employees, guards, watchmen and supervisors other than foreman

(Board Exh. 1(a)).

Subsequently, on February 5, 2015, Oceanic and the IBEW entered into a Stipulated Election Agreement listing the unit and eligible voters as follows:

**Included:** All production and maintenance employees performing work related to construction, installation, maintenance and service in the Cable Communication Industry based at the Employer's Kailua-Kona facility.

**Excluded:** Office clerical employees, professional employees, guards, watchmen, and supervisors as defined by the Act.

(Board Exh. 1(b)).

On March 12, 2015, an election was held at the Kona facility in which sixteen (16) ballots were cast for the IBEW and fifteen (15) ballots were cast against the IBEW. Two

(2) challenged ballots were also cast by employees Charles Peterson, the only Outside Plant Engineer (“OSP Engineer”) at the Kona facility, and Cora Bush, the only Dispatcher at the Kona facility. Since the challenged ballots are determinative to the outcome of the election, a hearing to resolve the challenged ballots was held on April 24, 2015 before Hearing Officer Trent Kakuda in Kona, Hawaii. The sole purpose of the hearing was to determine whether the OSP Engineer, Mr. Peterson, and the Dispatcher, Ms. Bush, should appropriately be included in the bargaining unit at issue at the Kona facility.

#### **IV. Factual Background**

##### **A. The Organizational Structure and Operations at the Kona Facility**

Oceanic provides cable television, internet, phone and other related services throughout the State, including the Kona area (Tr. 14-15; 81-85). Kona is its own separate franchise area and has 5 hubs, i.e., a location of equipment that generates a signal to feed the homes (Tr. 30; 48; 52-53), which serve customers in Kona. Oceanic’s Kona operation has only 61 employees at the Kona facility, which includes 53 non-supervisory employees (Emp. Exh. 1).

The General Manager at the Kona facility is Lorene Hough, General Manager of the Big Island (Emp. Exh. 1; Tr. 48). There are a total of three managers at the Kona facility who each manage separate departments: (1) Kauhi Keliiaa, the Technical Operations Manager for the Big Island, who oversees the Technical Operations Department in Kona, (2) Wayne Iokepa, the Outside Plant Engineering and Construction Manager for the Big Island, who oversees the Engineering and Construction Department in Kona, and (3) Wendy Newlon-Hill, the Customer Service Manager for the Big Island, who oversees the Customer Service Department in Kona (Emp. Exh. 1; Tr. 48-50).

Reporting to Kauhi Keliiaa in the Technical Operations Department are Patrick Lucas, the Installation Supervisor in Kona, and Matthew Castillo, the Maintenance Technician Leadman in Kona (Emp. Exh. 1; Tr. 48-50; 60-61). The Installers and Installer Technicians in Kona report directly to Mr. Lucas, and the Service Technicians and Maintenance Technicians in Kona report directly to Mr. Castillo (Tr. 48-50; 60-61). There are 14 Installers, 5 Installer Technicians, 5 Service Technicians, and 5 Maintenance Technicians in Kona (collectively referred to as “Field Reps”) (Emp. Exh. 1). Oceanic and the IBEW agree that Mr. Castillo, the Installers, the Installer Technicians, the Service Technicians, and the Maintenance Technicians are all included in the stipulated bargaining unit (Emp. Exh. 1). Cora Bush, the Dispatcher, is also in the Technical Operations Department and reports directly to Mr. Lucas (Tr. 61). There are no other employees in the Technical Operations Department in Kona.

Reporting to Wayne Iokepa in the Engineering and Construction Department is Robert Moeller, Construction Engineer in Kona (Emp. Exh. 1; Tr. 48-50; 63). Charles Peterson reports directly to Mr. Moeller and is part of the Engineering and Construction Department (Tr. 49-50). Also in the Engineering and Construction Department in Kona are a Hub Technician, Richard Baker, and a Systems Engineer, Patrick Carvalho, who both directly report to Wayne Iokepa (Emp. Exh. 1; Tr. 48-50; 31). Oceanic and the IBEW agree that Mr. Moeller, the Construction Engineer, Mr. Baker, the Hub Technician, and Mr. Carvalho, the Systems Engineer, are all not included in the stipulated bargaining unit (Emp. Exh. 1; Tr. 50).

Reporting to Wendy Newlon-Hill in the Customer Service Department is Starlite Bell-Kaopuiki, the Customer Service Supervisor in Kona (Emp. Exh. 1; Tr. 48-49). There are 15 Customer Service & Sales Representatives (also referred to as “Customer Service

Representatives”) in Kona that report directly to Ms. Bell-Kaopuiki (Emp. Exh. 1; Tr. 48-49). Oceanic and the IBEW agree that the Customer Service Representatives are not included in the stipulated bargaining unit (Emp. Exh. 1; Tr. 48-49). These Customer Service Representatives are office clerical employees who deal with customers at the front counter or in the Call Center on issues such as paying their bills and service scheduling (Tr. 24).

**B. The Dispatcher Position Held By Cora Bush**

As explained above, Cora Bush, the only Dispatcher in Kona, is in the Technical Operations Department managed by Kauhi Keliiaa (Tr. 20; 33; 49). Ms. Bush reports to Patrick Lucas, the Installation Supervisor, who also supervises the Installers and the Installer Technicians (Tr. 13; 49-50; 61). Ms. Bush has been a Dispatcher at the Kona facility for about 23 years (Tr. 17).

As the only Dispatcher in Kona, she has direct contact with the Field Reps on a daily basis all throughout the day (Tr. 18). Her primary job is to dispatch and route the Field Reps (Tr. 36). To perform her job, she has an understanding of the skill level of the Field Reps in order to dispatch the jobs properly (Tr. 36-37). She assigns work in the morning, makes sure that the work orders are given to specific Field Reps, and makes sure they are routed (Tr. 17). Throughout the course of the day, she ensures that the Field Reps’ jobs are completed, and monitors if they need assistance with a specific account (Tr. 18). She further assists the Field Reps by posting the work orders in the billing system (Tr. 18). One of her main functions as dispatcher is also to schedule the Field Reps and to make sure that the schedule calendar in the billing system is open a month in advance (Tr. 18-19).

Ms. Bush and the Field Reps use WorkAssure, a workforce management tool that

the Field Reps access on their tablets (Tr. 22-23). Ms. Bush assigns jobs electronically to the Field Reps through this program (Tr. 23). Ms. Bush is also in communication with the Field Reps throughout the day by telephone in order to assist if they are having trouble with a work order, e.g., if information is incorrect such as a job location/address and they need her to verify it (Tr. 19). If the information is incorrect, she would have to cancel the order and schedule it for the correct location (Tr. 19). Further, if a Field Rep needs additional equipment, they may call the Dispatcher to check to see if there is any available Field Rep in the area that they can meet up with to obtain the necessary equipment (Tr. 19). Likewise, if a job is taking longer than anticipated, the Field Rep communicates this to the Dispatcher (Tr. 19-20). The Dispatcher then tries to find another Field Rep to either assist with the job, or to cover the individual's next job (Tr. 20). These communications between the Field Reps and the Dispatcher occur throughout the day, and Mr. Lucas stated that Ms. Bush is "like the hub" for the Field Reps to communicate with (Tr. 20).

The Field Reps also call Ms. Bush directly in the morning to let her know if they will be out sick that day, and she coordinates with Mr. Lucas at the beginning of the day to ensure that there will be sufficient coverage, moving jobs around and shuffling the work if necessary (Tr. 18). As part of her job, she has daily contact throughout the day with Mr. Lucas about the morning scheduling, if employees call in sick, to confirm where Field Reps should be scheduled when creating the schedule calendar, to discuss if a Field Rep requests for vacation, or if one of the Field Reps has a status in conflict with his actual location (Tr. 20-21). Mr. Lucas testified that typically he would have contact with Ms. Bush 5-7 times a day for these purposes (Tr. 56).

In addition to the direct contact Ms. Bush has with the Field Reps through her dispatching work, she has direct face-to-face contact with the Field Reps as well. Every Tuesday, she attends an hour long “field meeting” with the Field Reps at the Kona office from 7:00 a.m. to 8:00 a.m. where they discuss various issues such as policy and procedure changes and updates, technical changes and updates, training, safety issues, channel lineups, frequency changes, changes to equipment—basically everything that involves the field is discussed at these meetings (Tr. 16-17, 23). Mr. Lucas requires Ms. Bush’s attendance at these meetings, and the only time that she has not attended has been when she was on vacation or sick—otherwise, she is at every single meeting with the Field Reps (Tr. 16-17; 46). In addition to attending the Tuesday meetings, the Field Reps are also at the Kona office every Thursday for half an hour to return and pick up their customer premise equipment (Tr. 15-16; 39).

Additionally, Ms. Bush downloads, prints, and then physically hand delivers the work orders for the Intelligent Home (home security system) installations to the Field Reps because these work orders are not electronic (Tr. 57-59). Similarly, she downloads, prints and physically hand delivers the Business Class work orders to the Field Reps as well (Tr. 57-59).

When Ms. Bush is out or on vacation, Mr. Lucas covers for her and fulfills her Dispatcher duties during the initial part of the day (Tr. 21-22; 55). He prepares a schedule of where all the Field Reps are and emails this schedule to Oahu Dispatchers who then cover for Ms. Bush for the rest of the day (Tr. 55). During the course of the day, the Field Reps will continue to call Mr. Lucas when Ms. Bush is out if they do not have contact with an Oahu Dispatcher in a timely manner (Tr. 55-56).

**C. The OSP Engineer Position Held By Charles Peterson**

As explained above, Charles Peterson is the only Outside Plant (“OSP”) Engineer at the Kona facility (Emp. Exh. 1; Tr. 100) and is in the Engineering and Construction Department in Kona.<sup>1</sup> His direct supervisor is Robert Moeller, Construction Engineer, who reports to Wayne Iokepa, the Manager of the Engineering and Construction Department (Emp. Exh. 1; Tr. 48-50; 52; 59). There is also a Hub Technician, Richard Baker, and a Systems Engineer, Patrick Carvalho, who also work in the same department and report directly to Wayne Iokepa (Emp. Exh. 1; Tr. 48-50; 31).

Unlike Ms. Bush and the Field Reps, Mr. Peterson is an exempt, salaried employee (Tr. 123). As an OSP Engineer, Mr. Peterson works alongside his supervisor, Robert Moeller (Tr. 63-64). Their job involves planning and designing the cable system, and then documenting it in the database using the AutoCAD (computer aided drafting) program to record all the maps (Tr. 63-64; 65). When they build a new system, they figure out all that is needed for the project, e.g., determine the signal levels, whether it is aerial or underground, etc., then design the plans on the computer (Tr. 63-64). The tools they use to do this work are generally just a computer and calculator (Tr. 63-64). They do a lot of work in the office to determine how much the design will cost, where it will be placed, and what parts are needed, and they create lists, bills of material and timelines (Tr. 64). Mr. Peterson assists Mr. Moeller in this work (Tr. 63-64).

Mr. Moeller explained that Mr. Peterson’s work as an OSP Engineer pertained only to planning work, and that he does not perform any work related to construction, installation, maintenance or service (Tr. 67; 71). Mr. Peterson does not interact with the Installers for typical installations (Tr. 66; 68), and he has never worked with any Field Reps (Tr.

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<sup>1</sup> Mr. Moeller explained that “outside plant” is anything to do with the distribution system which is referred to as “outside plant” (Tr. 76). “Inside plant” would be the infrastructure that is within the buildings (Tr. 76).

74). Moreover, Mr. Peterson does not perform any physical work out in the field, does not use meters and check signals, does not do any type of installation work, does not climb poles, and does not ever use a bucket truck—rather, Mr. Peterson just performs planning work (Tr. 60; 71; 74-75).<sup>2</sup> Further, he does not do any physical construction work, as this work is done by qualified outside construction crews that Oceanic hires in Kona (Tr. 72).

As part of his planning work as an OSP Engineer, Mr. Peterson does field surveys by looking at the infrastructure, poles and underground for the design to determine what problems they might run across (Tr. 66; 71). They also interact with County and State government agencies when there is a highway redesign project in order to do the design and planning, and they may work on utility agreements and do other types of documentation (Tr. 66-67). The OSP Engineer also marks where the cables are for Oceanic's outside construction contractors since they planned them and know where they are located (Tr. 72). Mr. Peterson does not lift or carry anything more than toner used to mark where the cable lines are underground, which is part of the planning work (Tr. 73). As far as equipment, Mr. Peterson would only use toner and a screwdriver in case he has to look in a cabinet to see what is there (Tr. 73). Mr. Moeller stated that even though Mr. Peterson may have been given a side cutter, prep tools and a crimper, he does not use them because he does not do any work requiring use of

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<sup>2</sup> Mr. Moeller was asked by the Union to review Union Exhibit 1, "Construction Coordinator/Junior Engineer Description," and asked to point out what Mr. Peterson does not do as an OSP Engineer (Tr. 71). Mr. Moeller stated that Mr. Peterson does not do any physical work in the field, does not go out and use meters and check signal levels, does not do any installation-type work, and does not climb poles (Tr. 71). He emphasized that Mr. Peterson's job was mainly planning and figuring (Tr. 71). Mr. Moeller stated that this document may not have been the final description for Mr. Peterson's OSP Engineer II position (Tr. 71). In this case, Mr. Peterson's position is an OSP Engineer, and not a "Construction Coordinator/Junior Engineer"-- the Union stipulated that Mr. Peterson's position title is an "OSP Engineer II," and Mr. Akamu likewise testified that Mr. Peterson's position is an "outside plant engineer" (Emp. Exh. 1; Tr. 100).



such tools (Tr. 73-74).

Mr. Lucas, the Installation Supervisor, confirmed that Mr. Peterson, the OSP Engineer, does not do work in the field, but assists Mr. Moeller with designing and uploading plans to the AutoCAD program and does ordering for the plans electronically using the People Soft ordering system (Tr. 25-26). Mr. Lucas stated that the employees he supervises rarely have contact with Mr. Peterson. For example, if a cable signal is too far away from the customer's home, the Installer would have to make a drawing to show how there is not enough signal and submit it to Mr. Moeller or Mr. Peterson (Tr. 26-29). On occasion, Mr. Lucas will get a call or email from Customer Service requesting information about a walk out survey if a customer calls inquiring about the status, and he will then ask Mr. Peterson or Mr. Moeller about the status (Tr. 50-51). Per Mr. Lucas, this occurs 1-2 times per month at best (Tr. 51). Mr. Lucas estimates that Mr. Peterson works in the office 90% of the time and works outside about 10% of the time (Tr. 47). He confirmed that Mr. Peterson never works alongside the Field Reps, does not respond to outages as part of his job, and does not perform or know how to perform splicing of cable (Tr. 41-42; 44-45; 74).

Mr. Peterson has only been in the position of OSP Engineer for about 5 months (Tr. 65). He is in the early stages of training and attended classes on Oahu regarding AutoCAD drafting (Tr. 65). Prior to becoming an OSP Engineer, he was a Customer Service Representative in Kona's Customer Service Department (Tr. 65; 58; 48). In that position, he was working with customers, doing billing, answering the phone, and setting up accounts (Tr. 65). Mr. Moeller explained that because of this experience, Mr. Peterson was familiar with software systems and was comfortable with using the computer (Tr. 65-66). Mr. Moeller explained that

was one of the reasons he selected Mr. Peterson for the position (Tr. 65-66). Mr. Moeller explained that Mr. Peterson is familiar with the software systems, comfortable with using computers and seems to be picking up the computer aided drafting system quickly (Tr. 65-66).

V. **Argument**

A. **Applicable Law When Resolving Determinative Challenged Ballots in Cases Involving a Stipulated Bargaining Unit Agreement**

In reviewing voter eligibility in a stipulated unit case, it is well established that the Board's function is to ascertain the intent of the parties with regard to inclusion or exclusion of a disputed voter and enforce the parties' intent unless such intent is inconsistent with any statutory provision or established Board policy. Desert Palace, Inc., dba Caesars Tahoe, 337 NLRB 1096 (2002); Associated Milk Producers, Inc. v. NLRB, 193 F.3d 539 (D.C. Cir. 1999).

The Board applies a three-part test to ascertain the parties' intent in stipulated unit cases:

(1) The Board must first determine whether or not the stipulated unit is clear on its face. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. Id. As the Board said in White Cloud Products Inc., 214 NLRB 516 (1974)

**“As already indicated, in stipulated-unit cases such as this it is incumbent upon the Board to ascertain the expressed intent of the parties with respect to the disputed employee. Here, the intent of the parties is expressed in their stipulation of the appropriate bargaining unit in clear and unambiguous terms. Without qualification, it is to exclude ‘leaders.’ If, as the Hearing Officer found, the hearing disclosed that one of the parties subjectively entertained an intent at odds with this stipulation, that intent cannot be given recognition. To do so would only undercut the very agreement which served as the basis for conducting the election.”**

Id. at 517. Thus, “such evidence of subjective intent is not a proper consideration.” Desert

Palace, Inc., 337 NLRB at 1099.

(2) If the stipulated unit description is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. Id.

(3) If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its community of interest test. Id.

**B. The Record is Clear that the Dispatcher at the Kona Facility, Cora Bush, Must Be Included in the Bargaining Unit at Issue**

**1. The Objective Language of the Stipulated Bargaining Unit Includes the Dispatcher Position**

In this case, the parties expressly agreed to include “[a]ll production and maintenance employees performing work related to construction, installation, maintenance and service” at the Kona facility, and to exclude “[o]ffice clerical employees” along with other traditional exclusions (emphasis added). As the only Dispatcher at the Kona facility, Ms. Bush is a production and maintenance employee who performs work related to construction, installation, maintenance and service in Kona. The performance of the Field Reps’ work is critically dependent on Ms. Bush and her work is an integral and essential part of the performance of construction, installation, maintenance and service work. She is part of the Technical Operations Department and the only non-supervisory employee in that department that the Union is claiming should be excluded from the unit. Even though the Dispatch classification is not specifically listed in the unit inclusions, nor are any of the other included classifications such as installer, installer technician, service technician or maintenance technician. It is well established that the failure to specifically list a disputed classification as included in the bargaining unit does not

establish that the parties intended to exclude that classification, particularly where no specifically included classifications are listed such as in this case. See Desert Palace, Inc., 337 NLRB at 1097-98; R.H. Peters Chevrolet, 303 NLRB 791 (1991); Lear Siegler, 287 NLRB 372 (1987).

Moreover, the plain meaning of the unit description logically includes the Dispatcher. In numerous cases, the Board has recognized that employees performing dispatch work “serve, albeit in a more vital capacity, much the same purposes as any member of . . . [a] unit of production and maintenance employees.” Arizona Public Service Co., 182 NLRB 505 (1970), *overruled on other grounds* (where the Board concluded that the employees performing dispatch work “should be represented, if at all, as a part of the existing unit of production and maintenance employees”). Accordingly, dispatchers have traditionally been included in production and maintenance employee units, and thus, an objective reading of the language of the stipulation would confirm that Ms. Bush should be included in the bargaining unit. See, e.g., Connecticut Light & Power Co., 121 NLRB 768, 769-70 (1958).

Although the stipulated unit language does not specifically exclude Dispatch and in fact logically includes the classification, the Union argues that the Dispatcher is ineligible because of the general “office clerical” exclusion. However, this contention is contrary to the language of the stipulated unit and well established Board law. The Board has held that employees performing dispatching duties are not “office clerical employees,” and thus will not be considered office clerical employees when interpreting the language of a stipulation agreement. In Desert Palace, Inc., dba Caesars Tahoe, 337 NLRB 1096 (2002), the Board held that the hearing officer erred in finding that the express language of the stipulation excluding “office clerical employees” reflected an intent to exclude an “engineering coordinator” who

performed dispatching and other duties for maintenance engineers.<sup>3</sup> The Board held that the coordinator could not be excluded from the unit based on the language of the stipulation excluding “office clerical employees” because he did not perform office clerical work but instead performed plant clerical work including dispatch. Id. The Board emphasized that it “has long drawn a distinction between ‘plant clericals’ and ‘office clericals,’” and that “dispatching duties have been found to be plant clerical in nature.” Id. Thus, the term “office clerical employees” could not be read to include an employee performing dispatch duties. Id.; Yale & Towne Mfg. Co., 112 NLRB 1268 (1955) (where the Board stated that it “is not bound by stipulations of parties to representation proceedings where the record facts disclose an inconsistency between the stipulation and established Board policy,” and held that dispatchers should be excluded from the office clerical unit because they are plant clerical employees which the Board “customarily includes in production and maintenance units and excludes from office clerical units”); Koehring S. Co., 108 NLRB 1131 (1954) (where the Board held that the dispatcher, as a plant clerical employee, should be excluded from the “office clerical employee” unit, and emphasized that it has “declined to establish single units combining office and plant clerical employees where the issue is raised by the parties”).

Accordingly, in this case, the Dispatcher is not an “office clerical employee,” and contrary to what the Union may try to assert, the language of the stipulation clearly does not exclude Ms. Bush. Rather, as explained above, the language of the stipulation includes **all**

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<sup>3</sup> The parties in Desert Palace, Inc., dba Caesars Tahoe, 337 NLRB 1096 (2002) stipulated to an election in the following unit: “All full-time and regular part-time Facility Maintenance Technicians I, II, and III and Outside Maintenance I and II [collectively referred to in the case as “Maintenance Engineers”] employed by the Employer in the Engineering Department; excluding all office clerical employees, guards, and supervisors as defined in the Act.”

“production and maintenance employees performing work related to construction, installation, maintenance and service,” and this would necessarily include the Dispatcher in Kona.

Likewise, any attempt by the Union to argue that it intended to exclude the Dispatcher based on its exclusion of “office clerical employees” is contrary to the language of the stipulation, inconsistent with established Board law, subjective and irrelevant. Even assuming that the Union subjectively intended to exclude the Dispatcher position when Mr. Akamu filed the petition, his subjective intent is irrelevant because it is entirely contrary to the language of the stipulation and cannot be given force. See White Cloud Products, Inc., 214 NLRB 516, 517 (1974). The Union’s subjective intent in defining the language is not controlling and cannot defeat the language of the stipulation and what such language means as it applies to the Kona facility. Nor, in light of the testimony, is the Union’s subjective intent clear in the record. Mr. Akamu testified he told Meredith Burns, the Board Agent, that he wanted all employees in the unit, except the employees specifically excluded (Tr. 119-120). This would indicate his intent to include the Dispatcher based on the language of the stipulation or ambiguity as to the Union’s subjective intent. Even assuming *arguendo* that the Union had a subjective intent to exclude the Dispatcher, this was not the stipulated language that the Union agreed to, and this purported subjective intent was never communicated during the Union’s dealings with Oceanic or the Board—rather, the intent communicated to Ms. Burns, the Board Agent, would indicate that the Dispatcher would be included in the unit.

Notwithstanding the above, should the Hearing Officer conclude that there is ambiguity as to the objective intent of the parties based on the language of the stipulation, the Dispatcher must nevertheless be included in the unit based on the extrinsic evidence, as

discussed below, or alternatively based on her overwhelming community of interest with the Field Reps, as discussed in Section B.3.

**2. Extrinsic Evidence Indicates that the Union Intended to Include All Employees in the Unit, Except Employees Specifically Excluded, and Thus This Would Include the Dispatcher**

In this case, there was no discussion or agreement regarding the Dispatcher position at any time prior to the stipulation (Tr. 104). However, Mr. Akamu testified that he told Meredith Burns, the Board Agent, that he wanted **all** Kona employees in the unit, except the employees specifically excluded (Tr. 119-120). This would evidence an intent to include the Dispatcher since she was not specifically excluded from the unit based on the language of the stipulation. Additionally, the fact that all other non-supervisory employees in the Technical Operations Department are part of the unit further evidences an intent to likewise include the Dispatcher, rather than fracturing the department and leaving one employee out.

The Union argues that the composition of bargaining units at other locations contradicts the Employer's position and establishes the Union's intention to exclude the Dispatcher. However, contrary to the Union's contention, the collective bargaining agreements ("CBAs") at Oceanic's separate facilities support rather than contradict the Employer's position herein. In drafting the "White Collar" bargaining unit language in Maui, the parties specifically included the classifications of "customer service representatives, support [office clerical employees] and dispatchers . . ." (U. Exh. 7 at p. 1, "Article 1, Recognition"). Had they believed dispatchers were included in the classifications of customer service representatives or support or traditional office clerical employees, they would have found it unnecessary to include the classification of dispatcher. Thus, the parties clearly understood that traditional office clericals

and dispatch are in separate classifications. Moreover, these CBAs apply to entirely separate facilities that have very different operations, reporting structures, sizes and procedures than the Kona facility. In fact, Mr. Akamu's testimony was clear that he was not aware of the exact employee composition at the Kona facility when he agreed to the unit language for the Kona facility. For example, he did not know if there was more than 1 Dispatcher, or that there was another non-supervisory engineer position, etc. (Tr. 92; 101). Moreover, he testified that he had no idea what the size of the Kona population was that the Kona facility covered, nor was he concerned about the size of the Kona population, when drafting the unit description (Tr. 91).

Additionally, Mr. Akamu testified that he was not part of the petition to establish these separate units on the other islands (Tr. 95), and the bargaining units and CBAs were already in place when he started his position in 2002 (Tr. 105). Moreover, Mr. Akamu believes that Oceanic was not the employer when these bargaining units and CBAs were established, and that it was a predecessor employer who entered into the CBAs with the Union (Tr. 105-106). When recognition of these other units was granted, he was not aware of what the dispatcher position was doing or what any of the engineer positions were doing on these other islands (Tr. 106). Mr. Akamu also has no knowledge of what agreements were made between the employer at the time and the Union (Tr. 106).

In sum, Mr. Akamu's admissions that he had little knowledge of the operations in Kona and no knowledge of the history behind the composition of the bargaining units at the other locations makes his testimony about the unit descriptions for other units and their influence on the unit description in this case meaningless and should be given no weight. Instead, the plain meaning of the stipulation should be given full force.



Further, the fact that the Dispatcher was not included on the Excelsior list does not constitute extrinsic evidence that parties intended to exclude her. Board law is clear that an employer's failure to include an employee or classification on an Excelsior eligibility list does not establish an intent by the parties to exclude the classification from the unit. Lear Siegler, 287 NLRB 372, 373 (1987). "Rather, such occurrences can just as easily be explained by the parties' oversight," and not evidence of any intent. Id. (where the employer failed to include a position on its Excelsior list and the Board agent challenged the ballot on the basis that the employee was not on the list, the Board held that the employer's omission did not establish an intent by the parties to exclude the employee from the unit). "As to the Excelsior list, its submission 'is of little help in determining the intended scope of a pre-election stipulation . . . [t]he submission of the list has never been held to preclude union ballot challenges since it is required for the Union's benefit.'" Desert Palace, Inc., 337 NLRB at 1099; N.L.R.B. v. Speedway Petroleum, Div. of Emro Mktg. Co., 768 F.2d 151, 157 (7th Cir. 1985). Accordingly, in this case, the failure to list the Dispatcher on the Excelsior list is not indicative of intent as opposed to mere oversight and/or unfamiliarity with the Kona operations by the individual on Oahu who prepared the list (Tr. 123-124). Oversight or unfamiliarity with the nature and duties of the contested position cannot be extrinsic evidence of intent.

Likewise, the parties' failure to discuss an employee or classification status at the time the election stipulation was entered into simply "indicates that the parties never addressed the issue." Lear Siegler, 287 NLRB 372, 373 (1987). Such lack of discussion does not indicate an intent to exclude the position. Id. (holding that the failure to discuss the eligibility of the position up through the date of the election paired with the failure to include the position on the

Excelsior list does not establish intent to exclude the position, as opposed to the employer's oversight).

As outlined above, Oceanic believes that the intent to include the Dispatcher is clear based on the language of the unit, and this is further confirmed by the extrinsic evidence.

3. **If the Hearing Officer Determines that There is Ambiguity as to the Objective Intent of the Parties to Include the Dispatcher in the Unit, a Community of Interest Analysis is Appropriate**

Should the Hearing Officer conclude that there is ambiguity as to the objective intent of the parties based on the language of the stipulation, a community of interest analysis should be applied, which would confirm that the Dispatcher is appropriately included in the unit. According to the "Outline of Law and Procedure in Representation Cases" issued by the Office of the General Counsel in August 2012, traditional community of interest factors that the Board examines include:

- a. **Degree of functional integration.** See Casino Aztar, 349 NLRB 603 (2007); Publix Super Markets, Inc., 343 NLRB 1023 (2004); United Rentals, Inc., 341 NLRB 540 (2004); United Operations, Inc., 338 NLRB 123 (2002); Seaboard Marine Ltd., 327 NLRB 556 (1999); Atlanta Hilton & Towers, 273 NLRB 87 (1984); NCR Corp., 236 NLRB 215 (1978); Michigan Wisconsin Pipe Line Co., 194 NLRB 469 (1972); Threads-Inc., 191 NLRB 667 (1971); H. P. Hood & Sons, 187 NLRB 404 (1971); Monsanto Research Corp., 185 NLRB 137 (1970); and Transerv Systems, 311 NLRB 766 (1993).
- b. **Common supervision.** See United Rentals, Inc., supra; Bradley Steel, Inc., 342 NLRB 215 (2004); United Operations, Inc., supra; Associated Milk Producers, 250 NLRB 1407 (1970); Sears, Roebuck & Co., 191 NLRB 398 (1971); Donald Carroll Metals, 185 NLRB 409 (1970); Dean Witter & Co., 189 NLRB 785 (1971); Harron Communications, 308 NLRB 62 (1992); Transerv Systems, supra; and Sears, Roebuck & Co., 319 NLRB 607 (1995).
- c. **The nature of employee skills and functions.** See United

Operations, Inc., supra; Overnite Transportation Co., 331 NLRB 662 (2000); Seaboard Marine Ltd., supra; J.C. Penney Co., 328 NLRB 766 (1999); Harron Communications, supra; Hamilton Test Systems, 265 NLRB 595 (1982); R-N Market, 190 NLRB 292 (1971); Downingtown Paper Co., 192 NLRB 310 (1971); and Phoenician, 308 NLRB 826 (1992).

- d. **Interchangeability and contact among employees.** See Casino Aztar, supra; United Rentals, supra; J.C. Penney, supra; Associated Milk Producers, supra; Purity Supreme, Inc., 197 NLRB 915 (1972); Gray Drug Stores, 197 NLRB 924 (1972); and Michigan Bell Telephone Co., 192 NLRB 1212 (1971).
- e. **Work situs.** See R-N Market, supra; Bank of America, 196 NLRB 591 (1972); and Kendall Co., 184 NLRB 847 (1970).
- f. **General working conditions.** See United Rentals, supra; Allied Gear & Machine Co., 250 NLRB 679 (1980); Sears, Roebuck & Co., supra; and Yale University, 184 NLRB 860 (1970).
- g. **Fringe benefits.** See Allied Gear & Machine Co., supra; Donald Carroll Metals, supra; Cheney Bigelow Wire Works, 197 NLRB 1279 (1972).

4. **The Dispatcher Must Be Included in the Bargaining Unit Because She Shares an Overwhelming Community of Interest With Other Production and Maintenance Employees Performing Work Related to Construction, Installation, Maintenance and Service at the Kona Facility**

In this case, Ms. Bush, plays a fundamental and indispensable role in the performance of work related to construction, installation, maintenance and service at the Kona facility, and shares a clear community of interest with the Field Reps in Kona. There is well established case law to support the fact that employees performing dispatch work for production and maintenance employees share an overwhelming community of interest with such production and maintenance employees by virtue of their work. In Arizona Public Service Co., 182 NLRB 505 (1970), *overruled on other grounds*, the employer, a public utility company engaged in the

generation and distribution of electric power, had a bargaining agreement with the union covering all “production and maintenance employees.” In determining that the dispatch employees would be appropriate as part of the “production and maintenance employee” bargaining unit, the Board stated that while the dispatch employees “have separate skills from those exercised by other unit employees . . . their duties are integrated, through intermediate personnel, with those of the field employees of the Employer.” Id. The Board concluded that the dispatchers “serve, albeit in a more vital capacity, much the same purposes as any member of the presently represented unit [i.e., production and maintenance employees].” Thus, the Board concluded that the dispatchers “should be represented, if at all, as a part of the existing unit of production and maintenance employees.” Id.

Likewise, in Connecticut Light & Power Co., 121 NLRB 768, 769-70 (1958), the Board held that dispatchers should appropriately be part of a bargaining unit covering production and maintenance employees at a public utility company engaged in the production and distribution of gas and electricity. The dispatchers at issue were responsible for coordinating all loading operations throughout the entire system and were “in constant contact, by telephone, with power station and substation personnel to whom they give instructions and orders to increase or decrease use of generating facilities to meet changing demands for power.” Id. In finding that the dispatchers should be part of the production and maintenance employee bargaining unit, and were not considered supervisory personnel as contended by the employer, the Board emphasized that “[i]n cases involving other power companies the Board has previously considered the status of load dispatchers who performed similar duties under circumstances comparable to those of the load dispatchers here involved and in each instance

found, in the absence of authority to change or effectively recommend the change in status of employees, that the load dispatchers were not supervisors . . . . [i]n fact, in all instances where there has been a dispute as to the unit placement of load dispatchers, the Board has included them in the production and maintenance unit.” Id.

In Browning Ferris, Inc., 275 NLRB 292 (1985), the Board disagreed with the hearing officer’s finding, and concluded that a dispatcher shared a community of interest with the employer’s drivers and helpers. The Board noted that on occasion “two swing drivers [unit employees] also perform dispatching functions in the dispatch area,” and that the dispatcher has “frequent contact” with the drivers throughout the day. Id. In the morning, the dispatcher distributed “logs or route sheets to the drivers,” and also communicated with them over the company radio or telephone with respect to extra and/or missed stops and emergency stops. Id. The dispatcher was also in the same department as these drivers. Accordingly, the Board held that the dispatcher shared a community of interest with the drivers such that he should be included in the unit. Id.; Minneapolis-Honeywell Regulator Co., 115 NLRB 344, 346 (1956) (stating that dispatchers have been found by the Board in previous decisions to “be plant clerical employees and have been included in production and maintenance units”); Rohr Aircraft Corp., 104 NLRB 499, 502 (1953) (stating that “[i]n accordance with the Board’s policy,” it would include dispatchers “with other plant clerical employees in the production and maintenance unit”).

As explained below, the record is clear that Ms. Bush likewise has frequent contact with the Field Reps who depend on her throughout the day, reports to the same supervisor as the Installers and Installer Technicians, is part of the same department as the Field

Reps, attends the same “field meetings” every Tuesday, etc., such that the shared community of interest is apparent and cannot reasonably be disputed. To exclude the Dispatcher from this unit would result in her being the only unrepresented non-supervisory production and maintenance employee performing work directly related to construction, installation, maintenance and service at the Kona facility, and the only unrepresented non-supervisory employee in her department, a result the Board seeks to avoid. See Desert Palace, Inc., supra p. 1101 fn. 16.

**a. There is Functional Integration Between the Dispatcher and the Field Reps, as the Dispatcher is Essential to the Performance of their Work**

As explained above, Ms. Bush has direct contact with the Field Reps on a daily basis all throughout the day (Tr. 18). Her primary job is to dispatch and route the Field Reps, and she has an understanding of the skill level of the Field Reps and what they can do in order to perform her job (Tr. 36-37). She assigns work in the morning, makes sure that the work orders are given to specific Field Reps, and monitors the Field Reps throughout the course of the day to ensure that their jobs are completed, to determine if they need assistance, to verify location/address information, assist if additional equipment is needed, and to monitor the status of jobs (Tr. 18-20). Her communication with the Field Reps is continuous, and she is like the “hub” for the Field Reps (Tr. 20). Ms. Bush also is the person responsible for making the calendar for the Field Reps so that jobs can be scheduled (Tr. 18-19).

The Field Reps contact Ms. Bush if they need to be out that day and she works with Mr. Lucas to ensure that there is sufficient coverage (Tr. 18). She also has direct face-to-face contact with the Field Reps every Tuesday at the Kona office during the hour long “field meetings,” and when she physically hand delivers the Intelligent Home and Business Class work orders to the various Field Reps (Tr. 16-17; 57-59).

Put simply, without Ms. Bush, the Field Reps would not be able to perform their work as they would not have their routes, assignments and work orders to service customers. She plays a vital role in communicating and interfacing with the Field Reps, and the record is clear and undisputed that there is close functional integration. It is important to emphasize that Mr. Akamu and the Union did not set forth any evidence to dispute the significant contact Ms. Bush has with the Field Reps on a daily basis or the work she performs for them as explained by Mr. Lucas. Accordingly, the record is clear that Ms. Bush shares a significant functional integration with the Field Reps such that she should be included in the bargaining unit with them.

**b. The Dispatcher and the Field Reps Have Common Supervision**

The Dispatcher and the Field Reps are all in the Technical Operations Department in Kona managed by Kauhi Keliiaa. As stated above, the parties agree that all non-supervisory employees, other than Ms. Bush, in the Technical Operations Department in Kona are in the bargaining unit, and thus, if excluded, Ms. Bush would be the only non-supervisory employee in the Technical Operations Department not in the bargaining unit (Emp. Exh. 1). Ms. Bush directly reports to Patrick Lucas, Installation Supervisor, who reports to Mr. Keliiaa. Mr. Lucas also directly supervises the 14 Installers and 5 Installer Technicians in Kona. The 5 Service Technicians and 5 Maintenance Technicians report to Matthew Castillo, the Maintenance Technician Leadman, who reports to Mr. Keliiaa as well. These facts were not disputed by the Union at the hearing, and thus it is uncontroverted that Ms. Bush and the Field Reps share common supervision such that she should be included in the bargaining unit with them.

**c. The Dispatcher and Field Reps Share a Common Function and the Field Reps are Dependent on the Dispatcher's Skill**

While the Dispatcher and the Field Reps may have different skill sets, they

certainly have similar overall functions and goals, i.e., ensuring that customers' cable service installation and repair needs are coordinated and addressed. As discussed above, Ms. Bush works extensively and directly with the Field Reps regarding the direct performance of their work, and they are dependent upon her for direction in performing their work. She is required to attend the weekly technical operations meetings so that she is aware of the issues in the department affecting the Field Reps. Moreover, she has knowledge of the skill level and type of work performed by each Field Rep to enable her to schedule them for various jobs.

**d. There is Frequent Direct Contact Between the Dispatcher and the Field Reps, and Interchangeability with Mr. Lucas in the Performance of Dispatching Duties When Ms. Bush is Out**

With respect to interchangeability, while Ms. Bush does not perform the job duties of the Field Reps, she is keenly aware of the nature of the work they perform to schedule them and to direct interchange among them. Further, Patrick Lucas, the Installation Supervisor, performs her dispatching duties in the morning when Ms. Bush is out sick or on vacation.

With respect to contact between Ms. Bush and the Field Reps, as discussed above, Ms. Bush has substantial and vital contact with the Field Reps on a daily basis, through the WorkAssure program, on the phone, and face-to-face during meetings and when hand delivering work orders to them. Again, the Union did not present any evidence to refute the Company's overwhelming evidence of the close and frequent contact between Ms. Bush and the Field Reps.

**e. There is a Common Work Situs Between the Dispatcher and the Field Reps When They Attend Field Meetings Together Each Week**

Although Ms. Bush works out of the Kona office and the Field Reps primarily work outside the office, both Ms. Bush and the Field Reps share a common reporting location and are together during the weekly hour-long "field meetings" each Tuesday at the Kona office,



as well as on Thursdays when the Field Reps are at the Kona office picking up their customer premise equipment.

**f. The General Working Conditions Between the Dispatcher and the Field Reps are Similar**

Ms. Bush and the Field Reps have similar working conditions insofar as working together in the same department under common supervision with a common goal. They share common working conditions in that they both work off of the WorkAssure program to drop and receive jobs, and communicate with one another by phone to address movement and service issues. Moreover, they attend the same technical operations meetings where they discuss policies and procedures, as well as other issues, affecting their department.

**g. No Evidence as to Fringe Benefits**

The parties did not present testimony regarding the fringe benefits of the Dispatcher and the Field Reps.

Accordingly, based on the community of interest analysis it is clear that the intent of the stipulated unit language was to include the Dispatcher and, given her integral role within technical operations, it would be entirely inappropriate to exclude her from the production and maintenance unit and leave her without any alternative unit. Therefore, Ms. Bush must be included in the unit and her ballot should be counted.

**C. The Record is Clear that the OSP Engineer at the Kona Facility, Charles Peterson, Must Not Be Included in the Bargaining Unit**

**1. The Objective Language of the Stipulated Bargaining Unit Does Not Include the OSP Engineer Position**

The testimony is undisputed that Mr. Peterson, the OSP Engineer, does not perform work related to construction, installation, maintenance and service as set forth in the unit

description (Tr. 41-42; 44-45; 67; 71; 74). Mr. Moeller and Mr. Lucas testified that Mr. Peterson's work only involves planning and designing work, as opposed to production or maintenance work (Tr. 63-64; 65).

Mr. Akamu testified that he had no idea what other OSP Engineers at Oceanic's locations on the other islands do, and thus the Union cannot attempt to speculate what Mr. Peterson does as an OSP Engineer (Tr. 120-121). While the Union may try to rely on Union Exhibit 1, entitled, "Construction Coordinator/Junior Engineer Description," this document is irrelevant as there is no such position in Kona and Mr. Moeller testified that Mr. Peterson does not do any physical work in the field, and pointed to numerous other things listed in the document that Mr. Peterson does not do and is not expected to do as an OSP Engineer (Emp. Exh. 1; Tr. 71). Accordingly, the language of the stipulation clearly excludes the OSP Engineer position.

In this case, the language of bargaining unit only covers "production and maintenance employees performing work related to construction, installation, maintenance and service" at the Kona facility. It is uncontested in this case that the OSP Engineer, Charles Peterson, is not a production or maintenance employee performing work related to construction, installation, maintenance and service. Therefore, the intent of the parties was clearly to exclude him. That clear intent is not in any way diminished by the fact that the OSP Engineer was not specifically listed in the traditional exclusions. The failure to list a disputed classification as excluded from the bargaining unit does not mean that the parties intended to include that classification. Desert Palace, Inc., dba Caesars Tahoe, 337 NLRB at 1097; R.H. Peters Chevrolet, 303 NLRB 791 (1991); Lear Siegler, 287 NLRB 372, 373 (1987).

However, were the Hearing Officer to conclude, contrary to the Employer's contention, that there is ambiguity as to the objective intent of the parties based on the language of the stipulation, extrinsic evidence resolves this ambiguity and establishes that the parties intended to exclude the OSP Engineer from the unit, as discussed below.

2. **Extrinsic Evidence Establishes that the Parties Intended the OSP Engineer to Be Excluded From the Unit at the Time They Entered the Stipulation and Therefore He Must Be Excluded from the Unit**

Here, the extrinsic evidence further verifies that the parties' objective intent at the time they entered the Stipulated Election Agreement was to exclude the OSP Engineer. When asked what his understanding was with respect to which employees would be covered under the unit description in the stipulated election, Mr. Akamu responded, "My understanding, when talking with all the people and writing up the stipulated agreement, was that it would include all the classifications covered under the Oahu blue collar contract" (Tr. 84-85). Mr. Akamu testified that Mr. Peterson is an OSP Engineer and that OSP Engineers on Oahu are not a listed classification in the Oahu blue collar bargaining unit (Tr. 99-100; U. Exh. 2). In fact, Mr. Akamu verified that there are no OSP Engineers included in any of the Union's blue collar bargaining units at Oceanic's other locations, and testified that Mr. Peterson is not in a position that is included in any of the other bargaining units on other islands (Tr. 101). Therefore, Mr. Akamu's testimony acknowledged that he never intended to have the OSP Engineer position included in the stipulated unit in Kona because he only intended to include classifications covered under the Oahu blue collar contract (U. Exh. 2).

Further, Mr. Akamu testified that when he wrote the petition and referred to "production and maintenance employees" he was referring to the "field people" who were out in

the field “[p]erforming the work and handling the material,” and only the technicians and installers perform this work (Tr. 96-97). He confirmed that he had no personal knowledge as to whether Mr. Peterson, as an OSP Engineer, even went into the field (Tr. 101).<sup>4</sup> Thus, by his own admission, he did not intend to include Mr. Peterson in the stipulated unit.

Additionally, Mr. Akamu also stated that when he wrote the petition he only knew of Mr. Peterson as an engineer at the Kona facility, and thus he was not aware that there was a Systems Engineer at the Kona facility who, like Mr. Peterson, works in the Construction and Engineering Department (Tr. 101; Tr. 48-50; Emp. Exh. 1). While Mr. Akamu testified that he looked at Mr. Peterson as an “engineer” and felt that “all engineers” should be included in the bargaining unit because Field Engineers on Oahu were included, he did not make any effort to determine if there were other engineers in Kona and seemed to be selectively picking who should and should not be in the unit without a rational basis.

Moreover, Mr. Akamu confirmed that his understanding was that the engineers at Oceanic’s other facilities actually perform some of the work, along with technicians (Tr. 103). Thus, he admitted that when he wrote the unit description, he wanted to include people who are actually performing the work related to installation and maintenance, and thus when he put the words down, he was referring to people who were performing the work (Tr. 104). He stated that he understood that at Oceanic’s other locations, engineers are performing such work (Tr. 104). Thus, Mr. Akamu’s intent supports an exclusion of the OSP Engineer from the unit since the record clearly establishes that Mr. Peterson does not perform work related to construction, installation, maintenance and service (Tr. 41-42; 44-45; 67; 71; 74).

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<sup>4</sup> Mr. Akamu also testified that he had no idea who any of the OSP Engineers at Oceanic’s other locations on the islands were and admitted to having no idea what they do (Tr. 120-121).

Further, the Union's attempts to analogize the OSP Engineer position to the Field Engineer position in the Oahu bargaining unit are unsupported by the record. The record shows that the Field Engineering position is entirely different from the OSP Engineer position in Oahu and any reliance the Union placed the responsibilities of the Oahu bargaining unit position on the inclusion of the OSP position in Kona is entirely misplaced. First, Mr. Akamu recognized that Union Exhibit 8 is the job description for the Oahu Field Engineer position (Tr. 89). Second, there is no dispute that Mr. Peterson is not a Field Engineer on Oahu. In fact, Mr. Akamu testified and the Union stipulated that Mr. Peterson is an OSP Engineer, not a Field Engineer (Emp. Exh. 1; Tr. 100). Third, Mr. Moeller testified as to the types of things Mr. Peterson does not do and is not expected to do as an OSP Engineer, which included things listed in the Oahu Field Engineer job description, including "assist field personnel," "lifting and carrying equipment," or the use of tools listed in the job description (Tr. 67-71; U. Exh. 8). Fourth, Mr. Akamu's testimony about the duties of an Oahu Field Engineer does not reflect Mr. Peterson's job duties as an OSP Engineer, a position admittedly not in the Oahu or any other Union bargaining unit. For example, Mr. Akamu testified that Oahu Field Engineers assist field personnel, and are carrying, digging, crawling through things, and doing other physical requirements (Tr. 99), none of which are required of the OSP Engineer (Tr. 63-64).

Understandably, the parties' intent in entering into the Stipulated Election Agreement can only be evaluated based on its actions prior to entering into the agreement. While the Union may point to discussions it had with the Board Agent and/or Oceanic regarding the OSP Engineer position's inclusion in the unit, those discussions all occurred after the parties already entered into the Stipulated Election Agreement after the Union received Oceanic's

Excelsior list (Tr. 117-118).

Thus, the relevant extrinsic evidence leads to a conclusion that the parties intended to exclude the OSP Engineer from the unit. Should the Hearing Officer conclude that there is still ambiguity notwithstanding the language and extrinsic evidence, the OSP Engineer must nonetheless be excluded from the stipulated unit because he lacks a community of interest with the Field Reps and Dispatcher who are production and maintenance employees performing work related to construction, installation, maintenance and service in Kona.

3. **The OSP Engineer Must Be Excluded From the Bargaining Unit Because He Does Not Share a Community of Interest With Production and Maintenance Employees Performing Work Related to Construction, Installation, Maintenance and Service at the Kona Facility**

In this case, as explained above, Mr. Peterson performs duties strictly related to design, primarily in his office at the computer, and cannot be considered a production or maintenance employee. Whereas the Dispatcher plays an integral and necessary role in enabling and directing the performance of the Field Reps' work on a constant basis, Mr. Peterson has a separate function designing for the system. Unlike the Dispatcher and Field Reps in the Technical Operations Department, Mr. Peterson is in the separate Construction and Engineering Department. Should Mr. Peterson be found to be part of the bargaining unit, he would be the only non-supervisory employee in the Construction and Engineering Department included in the unit. The Union has not at any time asserted that the Hub Technician and Systems Engineer, who are also in the Construction and Engineering Department, should be part of the bargaining unit and has not sought to represent them (Tr. 102). This is an inconsistent position for the Union to take given that Mr. Akamu testified that the reason he feels Mr. Peterson should be in

the unit is because he is an “engineer” (Tr. 99-101), and the fact that Mr. Akamu testified that the Hub Technician monitors the integrity of the networks and removes cables, i.e., work that seems more akin to the type of work performed by the Field Reps than what the OSP Engineer does (Tr. 102).

**a. There is No Functional Integration Between the OSP Engineer and the Field Reps**

Again, the only testimony regarding the work performed by the Field Reps and the OSP Engineer, and their respective functions, came from Mr. Lucas and Mr. Moeller. As explained above, to the extent that the Union tries to rely on documents pertaining to entirely different positions such as the Field Engineer, this should not be considered. According to Mr. Moeller, who works alongside Mr. Peterson, Mr. Peterson primarily plans, designs and documents for the cable system using a computer and the AutoCAD program in the office (Tr. 63-64). Mr. Peterson does a lot of paperwork such as creating lists, bills of material, timelines, and utility agreements (Tr. 63-64). Mr. Peterson has infrequent contact with the Field Techs, as verified by both Mr. Moeller and Mr. Lucas, the Installation Supervisor (Tr. 63-64; 66-68). Moreover, he has never worked with any of the Field Reps (Tr. 63-64; 74). Mr. Peterson just performs planning work (Tr. 60; 71; 74-75). There is simply no functional integration or overlap between the OSP Engineer and the Field Reps. They operate separately and do not depend on one another on a day to day basis to perform their work. For example, it would not impact on the work or operations of the Field Reps if Mr. Peterson were out on vacation, as their work is not integrated and they serve different functions in the organization. Thus, Mr. Peterson should be excluded from the unit on this basis.

**b. The OSP Engineer and the Field Reps Do Not Have Common**

## **Supervision**

As stated above, Mr. Peterson reports to Mr. Moeller, who reports to Mr. Iokepa in the Construction and Engineering Department. Conversely, the Dispatcher and Installers report to Mr. Lucas (and the Service and Maintenance Technicians report to Mr. Castillo), who in turn report to Mr. Keliiaa in the Technical Operations Department. The Construction and Engineering Department and the Technical Operations Department have different functions and no overlapping supervision.

### **c. The OSP Engineer and the Field Reps Do Not Have the Same Skills and Functions**

Mr. Moeller testified that Mr. Peterson's work is primarily performed on the computer using the AutoCAD program (Tr. 63-65). Likewise, Mr. Lucas, the Installation Supervisor, confirmed that Mr. Peterson assists Mr. Moeller with designing and uploading plans to the AutoCAD program and does ordering for the plans electronically using the People Soft ordering system (Tr. 25-26). Mr. Peterson received training on AutoCAD drafting on Oahu (Tr. 65), and Mr. Moeller explained that he wanted to work with Mr. Peterson because he was really familiar with software systems and very comfortable with using the computer based on his past experience as a Customer Service Representative (Tr. 65-66). This illustrates the emphasis and importance placed on the OSP Engineer's computer and software abilities needed to perform his job. It also demonstrates that field technical work was not part of the job, given that Mr. Peterson had no field background. Mr. Moeller and Mr. Lucas confirmed that the OSP Engineer has never worked with any Field Reps and does not perform any physical work out in the field, e.g., does not use meters and check signals, does not do any type of installation work, does not climb poles, and does not ever use a bucket truck (Tr. 60; 71; 74-75). Clearly, the computer and



design skills required for the OSP Engineer position and the type of functions he performs are vastly different from those of the Field Reps such that they do not share a community of interest.

**d. There is No Interchangeability Between the OSP Engineer and the Field Reps and Infrequent Contact**

With respect to interchangeability and contact, there is absolutely no interchangeability between the OSP Engineer and any Field Reps, as Mr. Moeller testified that Mr. Peterson was not trained to do Field Rep work. Likewise, the Field Reps do not do planning work like Mr. Peterson was trained to do. Further, with respect to contact, as explained above, the interaction with the OSP Engineer is limited. Mr. Peterson does not interact with the Installers for typical installations. On rare occasions, if a cable signal is too far away from the customer's home, the Installer would make a drawing to show how there is not enough signal and submit it to Mr. Moeller or Mr. Peterson (Tr. 26-29). Mr. Peterson never works alongside the Field Reps (Tr. 41-42; 44-45; 74).

**e. The OSP Engineer and the Field Reps Do Not Share a Common Work Situs**

The OSP Engineer works at the same Kona office as the Dispatcher, while the Field Reps primarily work out in the field (other than when they attend the field meetings on Tuesdays with the Dispatcher, and when they drop off and pick up equipment on Thursdays) (Tr. 39-40; 63). Although they may share a common reporting location, the OSP Engineer has very minimal contact with the Field Reps because he primarily works in the office on his computer. Unlike the Dispatcher, he does not communicate or work with the Field Reps throughout the day.

**f. The General Working Conditions of the OSP Engineer and Field Reps are Substantially Different**

As described in detail above, the daily working conditions between the OSP

Engineer versus the Field Reps are distinctly different. Whereas the Field Reps have their appointments and assignments issued, monitored and closely tracked by the Dispatcher, the OSP Engineer obviously does not. Again, the OSP Engineer spends most of his time in the office at a desk performing non-manual work while the Field Reps are out in the field installing and repairing cable service. They have different reporting chains and departments, and different expectations regarding their jobs and performance. Based on the significant differences in the working conditions, there is no community of interest to warrant the OSP Engineer's inclusion in the bargaining unit.

**g. The OSP Engineer is a Salaried, Exempt Position**

Although the parties did not present testimony regarding the fringe benefits of the OSP Engineer and the Field Reps, it should be noted that Oceanic represented at the hearing that Mr. Peterson is an exempt, salaried employee (Tr. 123).

Based on the community of interest analysis, the Union's attempt to include Mr. Peterson is either attributable to a mistaken understanding of his responsibilities for the Employer or to gerrymandering reflecting the extent of support. In either case, the community of interest analysis makes it clear that the parties did not intend him to be in the unit and that it would be inappropriate to place him in the unit. Therefore, Mr. Peterson's ballot should not be counted.

**VI. Conclusion**

For all the foregoing reasons, the Dispatcher should be included in the bargaining unit at issue, and her ballot should be opened and counted. In contrast, the OSP Engineer should not be included in the bargaining unit at issue, and his ballot should not be opened or counted. In

addition, a revised Tally of Ballots should be issued

DATED: Honolulu, Hawaii, May 1, 2015.

A handwritten signature in black ink, appearing to read "Daniel Silverman", is written over a horizontal line.

DANIEL SILVERMAN

RONALD Y.K. LEONG

STACI FUJIKAWA

Attorneys for Employer

OCEANIC TIME WARNER CABLE

### **CERTIFICATE OF SERVICE**

This is to certify that on this 1<sup>st</sup> day of May 2015, I have served a true and correct copy of the POST-HEARING BRIEF OF EMPLOYER OCEANIC TIME WARNER CABLE in Case No. 20-RC-145340 via electronic filing through the National Labor Relations Board's website, [www.NLRB.gov](http://www.NLRB.gov) upon:

Joseph F. Frankl  
Regional Director  
National Labor Relations Board, Region 20  
901 Market Street, Suite 400  
San Francisco, CA 94103

The POST-HEARING BRIEF OF EMPLOYER OCEANIC TIME WARNER CABLE was also served via email and hand delivery to the following:

Trent Kakuda  
National Labor Relations Board, Subregion 37  
300 Ala Moana Boulevard, Room 7-245  
Honolulu, HI 96850-0001  
[Trent.Kakuda@nrlrb.gov](mailto:Trent.Kakuda@nrlrb.gov)

Hearing Officer

The POST-HEARING BRIEF OF EMPLOYER OCEANIC TIME WARNER CABLE was also served via email to the following:

Sean Kim, Esq.  
Century Square, Suite 1210  
1188 Bishop Street  
Honolulu, Hawaii 96813  
[seankimlaw@gmail.com](mailto:seankimlaw@gmail.com)

Attorney for Union

DATED: Honolulu, Hawaii, May 1, 2015.

A handwritten signature in black ink, appearing to read "Daniel Silverman", is written over a horizontal line.

DANIEL SILVERMAN

RONALD Y.K. LEONG

STACI FUJIKAWA

Attorneys for Employer

OCEANIC TIME WARNER CABLE